BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2020-263-E

In Re:		
Cherokee County Cogeneration Partners, LLC,	)	
Complainant/Petitioner,	)	**DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S RESPONSE TO COMPLAINANT'S DECEMBER 23, 2020 LETTER**
v.	)	
Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC,	)	
Defendants/Respondents.	)	

Pursuant to S.C. Code Regs. 103-829 and other applicable South Carolina law and regulations, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP," and together with DEC, the "Companies" or "Duke") hereby submit to the Public Service Commission of South Carolina ("Commission") this response to Cherokee County Cogeneration Partners, LLC's ("Complainant" or "Cherokee") December 23, 2020 filing, which generally purports to supplement Complainant's Late-Filed Exhibit 3 ("December 23 Letter").

I. Background

In the interest of brevity, the Companies provide the below abbreviated summary of this proceeding. Complainant and DEC are parties to a power purchase agreement ("PPA") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[1] which expires on December 31, 2020 (the "2012 PPA"). The Complaint initiating this proceeding alleges, in part, that DEC and DEP have failed to act in good faith and consistent with PURPA in negotiating a successor PPA to

[1] 16 U.S.C. § 824(b).

purchase the output from Complainant's 89 megawatt ("MW") cogeneration facility (the "Cherokee Facility"). The Complaint also requested the Commission grant extraordinary "interim relief" by ordering DEC to extend the 2012 PPA beyond its December 31, 2020 termination date until the Commission has ruled on the issues raised in the Complaint. On December 8, 2020, Duke filed the Companies' Response to Complainant's Request for Interim Relief, arguing that granting the extraordinary relief requested would be inconsistent with PURPA and would unjustly harm DEC's customers, who would be required to pay significantly above avoided cost for the output of the Cherokee Facility.[2]

Oral argument on Complainant's Request for Interim Relief was held December 10, 2020. At the Commission's request, the Companies developed two late-filed exhibits and filed them with the Commission on December 15, 2020. Duke Late-Filed Exhibit 1[3] described DEC's methodology for calculating the utility's "as available" avoided cost under 18 C.F.R. 292.304(d)(1), which would be used to calculate the as-delivered avoided energy cost value for Complainant's power, which DEC continues to be required to purchase under PURPA after the 2012 PPA terminates on December 31, 2020. Duke's Late-Filed Exhibit 2[4] provided the Commission a detailed timeline and 20 separate attachments demonstrating the Companies' continuous good faith efforts to meet their PURPA obligations and consistent responsiveness to Complainant since 2018.

[2] In support of the Companies' Response to Complainant's Request for Interim Relief, Duke filed the affidavits of Michael T. Keen and John Freund. Mr. Freund, who is responsible for calculating the Companies' avoided costs, estimated that DEC's customers would pay approximately **$8 million** above DEC's current avoided cost rates if the 2012 Cherokee PPA were extended for an additional 12-month period.

[3] Duke's Late-Filed Exhibit 1 is supported by the Affidavit of Scott Burnside, Manager, Unit Commitment, for the Companies.

[4] Duke's Late-Filed Exhibit 2 is supported by the Affidavit of Michael Keen, Business Development Manager, for the Companies.

Subsequent to filing the late-filed exhibits, on December 15, 2020, DEC provided to Complainant a draft as-available energy power purchase agreement (the "Draft As-Available PPA") at Complainant's request. Duke is submitting the Draft As-Available PPA as Attachment 1 hereto for the Commission's information.

On December 16, 2020, Complainant filed Cherokee Late-Filed Exhibit 3, setting forth its version of the timeline and communications associated with Duke.

On December 23, 2020, Complainant filed its December 23 Letter, purporting to supplement the timeline and allegedly to address issues previously raised in Cherokee Late Filed Exhibit 3 relating the Draft As-Available PPA.

II. Duke Response to December 23 Letter

The December 23 Letter, in effect, alleges that the Draft As-Available PPA, is not satisfactory to Complainant and, therefore, the Commission should grant the request for emergency interim relief.[5] To support its position, Complainant's three page letter summarily alleges that the Draft As-Available PPA is discriminatory towards Complainant, as compared to the "Variable Rate agreements" offered to other QFs and that the methodology for calculating the avoided cost offered to Complainant resembles a purported "black box" model that is inconsistent with PURPA by failing to fix a rate for Complainant's energy prior to the time of delivery. While the letter is styled as a "supplement" to Complainant's Late-Filed Exhibit 3, it is, in actuality, a procedurally improper attempt to inject additional unsubstantiated information into this docket and further extend the false narrative, which continues to be equally as wrong on the law as it is on the facts.

[5] December 23 Letter, at 3.

As further addressed herein, Complainant's December 23 Letter provides little, if any, legal support for its allegations and scant support for its factual assertions. Similar to the Complaint itself, the December 23 Letter inaccurately explains PURPA's requirements and grossly mischaracterizes the recent course of dealings between Duke and Complainant. The Commission should reject Complainant's December 23 Letter and deny Complainant's Request for Interim Relief, ordering DEC to purchase output from the Cherokee Facility under the Draft As-Available PPA, consistent with 18 C.F.R. 292.304(d)(1), while the Complaint is pending before the Commission.

a. <u>Complainant mischaracterizes the applicability of a "Variable Rate agreement"</u>

Complainant's primary argument in the December 23 Letter is that DEC is allegedly behaving in a discriminatory manner towards the Cherokee Facility by offering the Draft As-Available PPA versus offering an unexplained "'Variable Rate agreement" that Complainant alleges is offered to "other similarly situated QFs."[6] These allegations are false and illustrate a total misunderstanding of the various avoided cost rate options available to QFs under the tariffs approved by the Commission.

Contrary to Complainant's allegations, there is no "Variable Rate agreement" for "other similarly situated QFs." The Companies surmise that Complainant uses the term "Variable Rate agreement" to refer to the Variable Rates offered to QFs that are 2 MW or less in size under the Commission-approved standard offer tariff ("Schedule PP").[7] The Variable Rate in Schedule PP, as approved by the Commission, provides a fixed short-term avoided cost rate option **for QFs 2 MW and less**. There is no "Variable Rate" offered in the Companies' Large QF Tariff or provided

[6] December 23 Letter, at 1-2.

[7] *See* Duke Energy Carolinas, LLC's Compliance Filing Pursuant to Order No. 2020-315(A), at Schedule PP (SC), p. 1 Availability, Docket No. 2019-195-E (filed May 15, 2020).

for in the Large QF PPA, as approved by the Commission.[8] Moreover, the Companies have repeatedly provided Complainant with the avoided cost rate options that are available under the Large QF Tariff.

Complainant's repeated allegations that Duke is behaving in a discriminatory manner and offering discriminatory terms to the Cherokee Facility, while, at the same time, providing "other similarly situated QFs" a fixed Variable Rate option is simply false. Complainant is completely dissimilar to a small QF eligible for Schedule PP, as the Cherokee Facility is natural gas-fueled cogenerator over 40 times the maximum nameplate capacity eligible for Schedule PP. For the avoidance of doubt, Complainant has never been eligible for *any* of the avoided cost rate schedules offered under Schedule PP.

Complainant also mischaracterizes a telephone discussion on December 18, 2020, where Duke explained to Complainant that the 2012 PPA (which is structured as a tolling agreement) includes no option for the Seller (Complainant) to sell its output to DEC at the Schedule PP Variable Rate either during or after expiry of the 2012 PPA. Again, the fact that Complainant is not eligible for the Variable Rates in Schedule PP is completely unrelated to the fact that that 2012 PPA is structured as a tolling agreement.

Simply put, Complainant's arguments regarding discriminatory treatment are factually baseless and in no way support the Commission granting Complainant's extraordinary request for interim relief.

b. Draft As-Available PPA is consistent with PURPA

The Draft As-Available PPA that DEC offered to Complainant on December 15, 2020 is also fully compliant with DEC's obligation to purchase Cherokee's energy under PURPA, where

[8] *See* Duke Energy Carolinas, LLC's Compliance Filing Pursuant to Order No. 2020-315(A), at Power Purchase Agreement – Large QF PPA (SC Act 62 Form), Docket No. 2019-195-E (filed May 15, 2020).

Complainant has elected not to sign a new long-term PURPA contract to sell its power over a specified future contract term. Complainant's allegations that the Draft As-Available PPA is a "discriminatory," "black box model" that "commits to no rate at all" and is "plainly unconscionable for a facility such as Cherokee" are factually incorrect and mis-represent PURPA's requirements.[9]

Notably, Complainant does not provide any discernable legal basis for its position because none exists. The methodology presented in Exhibit B to the Draft As-Available PPA—which is the same methodology presented to the Commission in Duke's Late Filed Exhibit 1—is fully consistent with FERC's regulation's implementing PURPA.

18 C.F.R. 292.304(d) provides QFs the option to sell energy on an "as available" basis "based on the purchasing utility's avoided costs ***calculated at the time of delivery***" or to obligate itself to sell its energy and capacity over a specified future term, in which case, the QF could elect to fix the avoided cost rates for future purchases at the time the PPA is executed.[10] The 2012 PPA, similar to most other PURPA PPAs, fixed the avoided cost rates to be paid over the term of the PPA. However, because Complainant has refused to enter into a new PPA based upon DEC's or DEP's avoided costs fixed over a future specified term (the option afforded under 18 C.F.R. 292.304(d)(2)), DEC has provided, at Complainant's request, an as-available purchase agreement under 18 C.F.R. 292.304(d)(1) designed to quantify DEC's avoided energy cost at the time of delivery.

[9] December 23 Letter, at 2.

[10] *See* 18 C.F.R. 292.304(d)(1)-(2) emphasis added. Duke notes that the FERC Order No. 872 and 872-A recently amended subsection (d) of 18 C.F.R. 292.304, which become effective December 31, 2020. These amendments to FERC's regulations, when effective, will not affect Duke's position regarding the as-available energy rates offered in the Draft As-Available PPA.

As described in Duke Late Filed Exhibit 1, the avoided energy rate calculation methodology incorporated into the Draft As-Available PPA will use a production cost model to determine the hourly avoided energy cost as the basis for the rate for purchase of as-available energy at the time of delivery to DEC's system. Contrary to Complainant's characterization, the use of production cost models to assess utilities' real-time system operations and marginal energy costs are well established in the electric utility industry and this methodology is in no way a "black box." It is true that this pricing methodology does not fix an avoided cost rate prior to the time of delivery; however, as described above, this is in no way inconsistent with PURPA, which provides QFs the option to either fix their avoided cost rates for a future specified term or to sell energy as-available based upon the utility's avoided energy costs at the time of delivery. Complainant's demand for fixed pricing prior to the time of delivery in order to allow the Cherokee Facility to decide whether or not to deliver energy to DEC is not required under PURPA, where a QF elects to sell power "as available" versus under a legally enforceable obligation.

The as-available methodology is also not "unconscionable for a facility such as Cherokee" as it is Cherokee that has elected not to proceed to execute a new fixed price PURPA PPA at DEC's forecasted avoided costs for a specified future term. PURPA does not treat Cherokee, as a natural gas-fired cogenerator, more favorably than other QFs because Cherokee has variable fuel costs and may elect whether to operate its facility and to deliver energy during a given period. To the contrary, PURPA requires utilities to purchase all QFs' power either on an as-available basis or pursuant to a legally enforceable obligation for a specified future term *at the QF's option.*[11] Moreover, the as-available methodology provided to Complainant is consistent with the

[11] *Id.*

methodology that DEP uses to purchase as-available energy from a similarly-situated large cogenerator QF in South Carolina.

In sum, Duke has fully met the Companies' legal obligations under PURPA and the Draft As-Available PPA is fully consistent with PURPA. Complainant's generalized arguments to the contrary should be rejected and in no way support the Commission granting Complainant's extraordinary request for interim relief.

c. <u>Duke continues to act in good faith in a nondiscriminatory manner and Complainant fails to support its allegations otherwise</u>

The December 23 Letter continues Complainant's pattern of baseless, unsubstantiated allegations, this time asserting that "Duke's response has no valid basis in law or policy, and is only further evidence of Duke's dilatory tactics and discriminatory behavior towards Cherokee, continuing now for over 2 years."[12] To the contrary, as explained herein, Duke's actions are squarely and soundly based on PURPA's requirements. Moreover, the Companies' efforts to respond to Complainant, as addressed herein and detailed in the Companies' Answer and Late-Filed Exhibit 2, tell a much different story. Duke has not been "discriminatory" or "dilatory" at any point in responding to Complainant. Even Complainant's own timeline presented in Late-Filed Exhibit 3,[13] fails to identify any point at which Duke failed to respond to Complainant and demonstrates that Duke has consistently been responsive to Cherokee.

Duke's recent actions to timely provide the requested Draft As-Available PPA demonstrate the Companies' continuing good faith efforts to negotiate with Complainant and to meet their PURPA obligations, while Complainant's continued disparagement and mischaracterization of

[12] December 23 Letter, at 2.

[13] Duke notes for the record that it disputes certain factual allegations and characterizations presented in Complainant's Late-Filed Exhibit 3, which Duke will fully address if this proceeding advances to an evidentiary hearing.

those efforts demonstrate that its legal argument is suspect and its factual allegations cannot reasonably be taken as true.

CONCLUSION

WHEREFORE, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectfully request that the Commission reject Complainant's procedurally improper December 23 Letter and deny Complainant's extraordinary request for interim relief.

Dated this 29th day of December 2020.

Respectfully submitted,

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